

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 754

OVERSIGHT HEARING ON DEMURRAGE AND ACCESSORIAL CHARGES

MOTION FOR PROTECTIVE ORDER

Decided: May 14, 2019

By motion filed on May 1, 2019, Canadian National Railway Company (CN) seeks a protective order under 49 C.F.R. § 1104.14 to protect certain information submitted that same day under seal in this proceeding that it describes as competitively sensitive and proprietary.¹ Included with the motion are a proposed protective order and associated undertakings for confidential and highly confidential materials. CN states that a protective order is necessary to protect the submitted information from disclosure and will enable CN to present the information while protecting its confidentiality.

The motion for protective order conforms to the Board's rules at 49 C.F.R. § 1104.14 governing protective orders to maintain confidentiality. Accordingly, the motion for protective order will be granted, and the modified protective order and undertakings in the Appendix to this decision will be adopted. However, CN is directed to submit an explanation for its designation of the remaining information from its May 1 submission as non-public and why it designated it as highly confidential. CN's submitted information was responsive to a Board order directed at all Class I rail carriers and the Board wants to promote transparency to the greatest extent possible.

It is ordered:

1. The motion for a protective order is granted, and the modified protective order and undertakings in the Appendix to this decision are adopted.
2. Materials will be kept under seal by the Board and not placed in the public docket or otherwise disclosed to the public, unless the appropriate attached undertaking is executed and the terms of the protective order are followed, or unless otherwise ordered by the Board.

¹ On May 10, 2019, CN filed an amendment that made public some information that was previously designated as highly confidential.

3. CN is directed to submit an explanation for its designation of the remaining information as non-public and why it designated it as highly confidential by May 20, 2019.

4. This decision is effective on its service date.

By the Board, Allison C. Davis, Acting Director, Office of Proceedings.

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

a. “Confidential material” means information or material designated as “CONFIDENTIAL,” and any information or material derived therefrom.

b. “Highly Confidential material” means information or material designated as “HIGHLY CONFIDENTIAL,” and any information or material derived therefrom.

c. “Party” means a party to STB Ex Parte No. 754.

d. “Proceeding” means (i) the proceeding before the Surface Transportation Board (“Board”) in Docket No. Ex Parte 754 and (ii) any judicial review proceedings arising from (i).

2. Any Party producing information or material in discovery to another Party in this Proceeding, or submitting information or material in pleadings or evidence in this Proceeding, that the Party believes in good faith reveals confidential information may designate such information or material as “CONFIDENTIAL” in accordance with paragraph 4.

3. Any Party producing information or material in discovery to another Party in this Proceeding, or submitting information or material in pleadings or evidence in this Proceeding, that the Party believes in good faith reveals shipper-specific or railroad-specific rate, cost, quantity, routing, or other competitively sensitive or proprietary information may designate such information or material as “HIGHLY CONFIDENTIAL” in accordance with paragraph 4.

4. The designation of information or material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be made as follows:

a. For pleadings, by imprinting the word(s) “Confidential” or “Highly Confidential” on the cover page of the pleading.

b. For documents and other materials, by imprinting the word(s) “Confidential” or “Highly Confidential” on the face of each page of a document so designated or in a similarly conspicuous location for non-document materials.

c. For depositions, by indicating on the record at the deposition or upon review of the deposition transcript which portions of the transcript and/or responses should be treated as “Confidential” or “Highly Confidential.”

d. For electronically stored information, either by imprinting the word(s) “Confidential” or “Highly Confidential” on any disk or storage medium, or on the face of each page of a document so designated.

5. Confidential Material may not be disclosed in any way, directly or indirectly, to any person or entity, except to an employee, counsel, consultant, or agent of a Party to this Proceeding, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the Undertaking for Confidential Material.

6. Highly Confidential Material may not be disclosed in any way, directly or indirectly, to any employee of a Party to this Proceeding, or to any other person or entity, except to an outside counsel or outside consultant of a Party, who, before receiving access to such information or material, has received and read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking in the form set forth in the Undertaking for Highly Confidential Material.

7. Confidential Material and Highly Confidential Material shall be used solely for the purposes of this Proceeding, and not for any other business, commercial, operational, or competitive purposes.

8. In the event that a Party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing Party may notify the other Parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation and promptly furnish properly designated material. A Party that received the material without the confidentiality designation must return the non-designated material or destroy it, as directed by the producing Party, or take such other steps as the Parties agree to in writing, and must make all reasonable efforts to recover such material from any non-Parties to which it may have been disclosed, and any copies made by such non-Parties.

9. In the event that a Party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing Party may make a written request within a reasonable time after it discovers the inadvertent disclosure that another Party return the inadvertently produced material. A Party that received the inadvertently produced material must either return the material or destroy it immediately upon receipt of the written request, as directed by the producing Party. By returning or destroying the material, the receiving Party is not conceding that the material is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

10. No Party may include Confidential Material or Highly Confidential Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.

11. If any Party intends to use Confidential Material or Highly Confidential Material in the course of any deposition in this proceeding, the Party so intending shall so advise counsel for the Party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such Confidential Material or Highly Confidential material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose Confidential Material or Highly Confidential Material shall be kept under seal and treated as Confidential Material or Highly Confidential Material in accordance with the terms of this Protective Order.

12. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced or otherwise disclosed by a Party in this Proceeding and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains shall be deemed essential for the disposition of this Proceeding and any related proceedings and shall not be deemed a violation of 49 U.S.C. §§ 11323 or 11904 or any other relevant provision of the Interstate Commerce Act, as amended by the ICC Termination Act of 1995.

13. Except for this proceeding, the Parties agree that if a Party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by another Party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the Party so required shall notify the producing Party in writing within three working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within three working days prior to such release, whichever is soonest, to permit the producing Party the opportunity to contest the release.

14. Information that is publicly available or obtained outside of this Proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this Proceeding.

15. A “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” designation may be removed by consent of a Party who asserts the confidential, proprietary, or commercially sensitive interest, or absent such consent, by appropriate decision of the Board upon application of a Party seeking to remove such designation.

16. Each Party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that Party or if generated or compiled by another party, the information the data, information or documentation was disclosed by the producing Party in the ordinary course of business to the other Party), even if that data, information and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing Party, without securing prior permission from the producing Party.

17. Any Confidential Material or Highly Confidential Material that is received by a Party and is not that Party's own material, and any information or material derived therefrom, must be destroyed by the receiving Party, its employees, counsel, and agents at the completion of this Proceeding, except that (1) outside counsel for each Party may retain file copies of all pleadings and evidence filed with the Board; and (2) in-house counsel for each Party may retain file copies of all pleadings and evidence which they were authorized to review under this Protective Order.

18. All Parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version. When filing a Highly Confidential Version, the filing Party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the Party's submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other Party's in-house counsel. The Confidential Version may be served on other Parties in electronic format only. In lieu of preparing a Confidential Version, the filing Party may (simultaneously with the Party's submission to the Board of its Highly Confidential Version) make available to outside counsel for any other Party a list of all "HIGHLY CONFIDENTIAL" information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other Party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order governing the production of confidential information and material in STB Ex Parte No. 754, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in the above-referenced proceeding or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel may retain copies of pleadings and evidence which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order governing the production of confidential information and material in STB Ex Parte No. 754, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated “HIGHLY CONFIDENTIAL” to any person or entity who: (i) is not eligible for access to “HIGHLY CONFIDENTIAL” material under the terms of the Protective Order, or (ii) has not executed a “HIGHLY CONFIDENTIAL” undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated “HIGHLY CONFIDENTIAL,” that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel may retain file copies of pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated “HIGHLY CONFIDENTIAL” by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____